In the Matter of	
ROBERT J. BUNOL	
Claimant	
against	Date Issued: 9/22/94
	Case No. 90-LHC-3223
GEORGE ENGINE COMPANY	
	OWCP No. 07-107003
Employer	
and	
LOUISIANA INSURANCE GUARANTEE ASSOCIATION	
Carrier	

APPEARANCES:

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BEFORE: QUENTIN P. MCCOLGIN
Administrative Law Judge

DECISION AND ORDER GRANTING PETITION TO MODIFY AWARD

I. HISTORY

This matter arises under the Longshore and Harbor Workers' Compensation Act ("Act"), 33 U.S.C. § 901, et. seq. It concerns

a claim by Robert Bunol ("Claimant") against George Engine Company ("Employer"), which claim is defended by its Carrier, Louisiana Insurance Guarantee Association (LIGA). Employer seeks modification pursuant to Section 22 of the Act of the initial decision and order entered by Administrative Law Judge Ben H. Walley on the basis of mistakes of fact made in determining Claimant's average weekly wage as well as his residual wage-earning capacity. In addition, Claimant seeks Section 22 modification based on a change in conditions.

Judge Walley determined that Claimant was unable to resume his former employment and was permanently partially disabled with a residual wage-earning capacity of $240.38 per week. (Decision and Order p. 12). He calculated Claimant's average weekly wage under section 10(c) and determined that there was evidence of Claimant's earnings for only forty-two of the fifty-two weeks prior to his injury. Therefore, he averaged Claimant's annual earnings for the years 1978 and 1979 and arrived at an annual wage of $23,939.36, with a corresponding average weekly wage of $460.37. Id. at 13-14. Employer appealed the award and while that appeal was pending before the Benefits Review Board, Employer filed its modification petition. The Benefits Review Board then dismissed Employer's appeal and remanded the matter to this office for consideration of Employer's petition for modification. A formal hearing on the modification proceeding was held on December 15, 1992, during which counsel for both parties presented evidence and argument. The following exhibits were received into evidence.[1]

(1) Carrier's Exhibit Nos. 16-30;

(2) Claimant's Exhibit Nos. 14, 16-35, 37-38.

On April 13, 1993, Claimant filed a motion to admit into evidence a medical report of a post-hearing medical examination of Claimant. This motion was treated as a modification petition based on a change of conditions and the record was again opened to hear evidence on Claimant's Section 22 petition. A formal hearing on Claimant's modification petition was held on January 27, 1994. Both parties presented evidence and argument and the following exhibits were received into evidence:

(1) Carrier's Exhibit Nos. 31-32, 37-38, 41-44;

(2) Claimant's Exhibit Nos. 39-45;

(3) Joint Exhibit No. 3.

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[1] The following abbreviations are used for citation of the record: Tr. (hearing transcript); CX (Claimant's exhibit); LX (Carrier's exhibit); JX (joint exhibit); and EX (Employer's exhibit from the original hearing of March 5, 1991).

The parties again submitted post-hearing briefs.

II. STATEMENT OF THE CASE

Claimant began work for Employer in November, 1972 as a helper and eventually became a diesel mechanic. (Mar. 1991 Tr. 21-22). On July 31, 1979, he suffered a work-related injury to his back and thereafter sought treatment from Dr. Alain Cracco, a board-certified orthopedic surgeon. (Mar. 1991 Tr. 27-29; JX-2, pp. 3-4). Claimant was released to work for September 4, 1979, and he worked without incident for several months. (JX-2, pp. 6-7). Claimant returned to Dr. Cracco on March 4, 1980, complaining of discomfort in the right leg hamstring. Dr. Cracco diagnosed a herniated intervertebral disc at L4-5 and placed Claimant in the hospital for further testing. Id. at 7-8. A myelogram confirmed Dr. Cracco's diagnosis, and on April 28, 1980, Dr. Cracco performed a hemilaminectomy and L5-S1 diskectomy. Id. at 8-9. Claimant was discharged on May 2, 1980 and was released for light duty on July 9, 1980, with the restrictions of no lifting, climbing, or repetitive bending. Id. at 10-11.

Claimant returned to work on light duty status on July 14, 1980. It is his testimony that he performed his regular duties despite his light duty status; however, for six months, he reduced his work week from sixty to sixty-five hours to forty to forty-five hours. (Mar. 1991 Tr. 32-33). Thereafter, Claimant resumed his regular work schedule and performed his regular duties until March 1988 -- over seven years later -- when Employer went out of business. Id. at 32. He testified that he worked under constant pain and weakness of his right leg. According to Claimant, "the pain was always there . . . [but] it wasn't that often . . . that I'd miss work." Id. at 38.

Claimant was unemployed from March 1988 until September 1988 when he commenced working as a claims representative for his brother's insurance business. He worked there earning $12,500.00 per year from September 1, 1988 to August 8, 1990 when his brother sold the business. Id. at 41. Claimant's only employment since then has been self-employment. He incorporated his own company, Bob's Lawn and Saw, in June, 1991. (Dec. 1992 Tr. 27). Under the auspices of that company, Claimant repaired lawn mowers and small engines. Id. at 49. He reported a profit of $1000.00 from that activity in 1991 and no profit in 1992. Id.

The basis of Claimant's modification petition based on a change of conditions begins with the April 23, 1993 letter from Dr. Cracco in which Dr. Cracco recommended that Claimant undergo a L5-S1 fusion and requested authorization for an EMG and nerve conduction study to confirm whether the fusion was necessary. (See attachment to letter from Claimant's counsel, filed April

30, 1993). Dr. Cracco expressed a sense of urgency, noting that "if Claimant [is] not allowed to have this testing and possible surgery, his future health will be jeopardized." Id. On May 3, 1993, Dr. Cracco issued a report to Carrier in which he "strongly recommended" the fusion based on Claimant's subjective complaints and objective findings, in particular an MRI of Claimant's lumbar spine taken on April 5, 1993. (See letter to Carrier, filed May 7, 1993). Dr. Cracco further reported:

> As of March 30, 1993, we did not feel the patient could resume work until his back condition has changed[,] which is not likely[,] or he undergoes surgery. If he should undergo surgery, he will be totally disabled for approximately eight months to one year. Again, we feel if this patient does not receive proper treatment, his future health will be jeopardized.

Id.

Dr. David Aiken, a board-certified orthopedic surgeon chosen by Carrier, examined Claimant on August 3, 1993. (LX-31 p. 6). He took X-rays of Claimant's spine which revealed some collapse of the L5-S1 disc. Dr. Aiken determined that the X-ray findings were consistent with Claimant's prior surgery and showed no abnormalities. Id. at 18. He deposed that there was no gross instability of Claimant's low back that would require a fusion and he recommended against surgery. Id. at 18, 20.

The District Director appointed an impartial specialist to examine Claimant in accordance with 20 C.F.R. § 702.408 (1993). On November 2, 1993, Dr. Courtney L. Russo, a board-certified orthopedic surgeon who had been appointed as an impartial specialist examined Claimant. (Jan. 1994 Tr. 93). Dr. Russo reviewed Claimant's X-rays and recommended further testing. Claimant was admitted to Baptist Hospital in New Orleans, Louisiana on November 29, 1993, for a lumbar myelogram and CAT scan. Id. at 96. The myelogram impression was an anterior extradural defect impinging the S1 nerve root on the right and a slightly bulging disc at the L4-5 level. Id. at 96-97. The CAT scan was interpreted as showing an L4-5 mild bulging disc with no evidence of nerve root impingement. The L5-S1 intervertebral disc level showed loss of height, osteophyte formation and resulting pressure on the nerve root sleeve at that level. Id. at 97.

Upon reviewing the diagnostic tests, Dr. Russo concluded that Claimant had a degenerative disc at L5-S1, a bulging disc at L4-5, and a moderate bulge at the L5-S1 level that had been bulging to the right and had been irritating the S1 nerve root going down the right leg. Id. He opined that Claimant could return to gainful employment but could not perform medium or heavy work, but only sedentary to light work. Id. at 98, 129-30. He recommended restrictions of no repetitive lifting, pushing, or

pulling of over twenty-five pounds; no occasional lifting, pushing, or pulling of over thirty pounds; no sitting longer than forty-five minutes at a time; and no bending. Id. at 107-08, 114, 127. Dr. Russo further recommended that Claimant undergo another laminectomy, have a re-exploration of the L5-S1 disc space, a decompression of the S1 nerve root, and a bilateral fusion from L4-5 to S1. Id. at 98. When asked why surgery was necessary in this case, Dr. Russo cited Claimant's being unable to lift more than ten pounds, Claimant's facet joint arthritis, the degenerative change at the L5-S1 level, Claimant's ranges of motion, and the neurological findings of nerve root compression, as reasons to necessitate surgery. Id. at 106-07.

Dr. Alain Cracco, Claimant's treating physician, was deposed on January 19, 1994. (CX-45). Dr. Cracco testified that he had been recommending a surgical lumbar fusion for Claimant since 1988. Id. at 6. He clarified that a fusion is generally recommended after noting the progression or recurrence of symptoms over months or years, and that it is an elective procedure that depends upon how much the recurring symptomology, or flare-ups, are disruptive to the patient's life. Id. at 28-29. Dr. Cracco stated that he recommended surgery for Claimant based on his physical examinations of Claimant and Claimant's response to treatment over the years. He testified that Claimant's long history suggested that his problem was instability of the lower lumbar area. Id. at 11, 14-15, 59. Dr. Cracco further explained that his recommended work restrictions of several years past were mainly guidelines for Claimant's activity level and that a functional capacities evaluation would present a more accurate picture of Claimant's abilities, which findings he would then reduce by thirty or forty percent. Id. at 52.

At the modification hearing on January 24, 1994, Employer presented evidence of Claimant's residual wage-earning capacity. Certified vocational rehabilitation counselor, Nancy Favoloro, conducted a labor market survey on Claimant's behalf in September, 1993. (Jan. 1994 Tr. 75). She identified the positions of claims representative at State Farm Insurance Company that paid $23,800 per year; photo lab technician at K & B Drugstore that paid $5.50 per hour; splicer technician at K & B Drugstore that paid $5.50 per hour; repair technician at Black and Decker that paid between $6 and $8 per hour; manager trainee position at Enterprise Rent-A-Car that paid between $17,000 and $18,000 per year; dispatching position at Lucky Coin Co that paid $4.50 per hour; central station operator at Main Electronics that paid $5.00 per hour; and a monitor operations position that paid $4.75 per hour. Id. at 76-78. Ms. Favoloro indicated that all of the identified jobs were within Claimant's physical capabilities and that he was qualified to perform these jobs on the basis of his education, training and experience. All of these jobs were located in the New Orleans area. Id. at 80. Ms.

Favoloro testified that based on Claimant's background, the repair technician job at Black and Decker was probably the most suitable position for Claimant because it was repairing things, an activity which was within Claimant's realm of experience. Id. at 88-89.

Employer also presented testimony from Wayne Centanni, a licensed private investigator who performed surveillance on Claimant on several occasions. Mr. Centanni observed and videotaped Claimant's activities on August 3, 1993, when he followed Claimant from his residence to Dr. Aiken's office, and from Dr. Aiken's office to Sam's Wholesale Club in Kenner, Louisiana. Id. at 54. Mr. Centanni followed Claimant into Sam's Wholesale Club where he observed Claimant lifting a fifty pound tub of laundry detergent from a shelf onto a shopping cart. Id. at 70. He also photographed and videotaped Claimant and his wife placing the tub into their car. Id. at 54.

Claimant testified that he can perform many household tasks such as mowing the lawn, raking, and carpentry work, but that he cannot do so without pain. Id. at 16. Claimant stated that since 1988, his pain has become worse and becomes aggravated more quickly. Id. at 28. Claimant indicated that he wanted to have the fusion in 1988, but he did not have it then because Carrier refused to pay for the procedure. Id. at 29. He stated that after the MRI of April, 1993, his treating physician, Dr. Cracco, again recommended a fusion, for which Claimant requested approval from the Department of Labor. Id. at 32. Following the examination by Dr. Aiken and Dr. Russo's recommendation that he undergo fusion surgery, Claimant again requested approval for surgery. Claimant stated that the fusion has not yet been approved. Id. at 34.

III. Findings of Fact and Conclusions of Law

Under Section 22, a party-in-interest may request modification because of a mistake in fact or a change in condition within one year of the last payment of compensation or rejection of a claim. 33 U.S.C. § 922. Here, Employer requests modification based on a mistake in fact and Claimant seeks modification based on a change of condition.

A. Change of Condition

Modification based on a change in condition is granted where the claimant's physical condition has improved or deteriorated following entry of the award. The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. Rizzi v. The Four Boro Contracting Corp., 1 BRBS 130 (1974). The party requesting modification due to a change in condition has the burden of showing the change in condition. Winston v. Ingalls

Shipbuilding, Inc., 16 BRBS 168 (1984). The Section 20(a) presumption is inapplicable to the issue of whether the claimant's condition has changed since the prior award. Leach v. Thompson's Dairy, Inc., 6 BRBS 184 (1977).

Claimant requested modification based on a change of physical condition. This request was premised in part on Dr. Cracco's report of April 2, 1993, in which Dr. Cracco expressed the opinion that Claimant was physically unable to work at that time. (CX-39, p. 2). Claimant's request was also based on two additional reports of Dr. Cracco: one dated April 21, 1993, in which Dr. Cracco expressed a sense of urgency about the necessity of surgery, and another dated May 3, 1993, in which Dr. Cracco reiterated that Claimant could not return to work until his condition changed, which circumstance, Dr. Cracco stressed, would be unlikely without surgery. (CX-40; CX-41, p. 2).

The record shows however, that the fusion recommended by Dr. Cracco does not represent a change in Claimant's condition. Dr. Cracco has been recommending fusion surgery for Claimant since 1988. (CX-45, p. 6). This continued to be Dr. Cracco's recommendation at the time of his deposition immediately before the initial hearing; however, at that time Claimant elected not to undergo the recommended surgical procedure. (JX-2, p. 28).

While Dr. Cracco's 1993 opinion that Claimant should be restricted from working could be construed as indicating a change in Claimant's condition, it appears, on balance, that these restrictions are unnecessarily restrictive. The more reasonable work restrictions imposed by Dr. Russo are not significantly different from those previously imposed by Dr. Cracco. The impartial specialist, Dr. Courtney Russo, examined Claimant in late 1993 and ordered diagnostic tests. (Jan. 1994 Tr. 93). Dr. Russo concluded that Claimant could perform sedentary to light-duty work as long as he remained within the restrictions of no repetitive lifting over twenty-five pounds, no lifting of over fifty pounds, no sitting longer than forty-five minutes at a time and no bending. Id. at 107-08, 114, 127. In comparing these conflicting opinions, it appears that the more severe restrictions imposed by Dr. Cracco may, to some extent, represent some frustration on that physician's part in securing authorization for the surgical procedure which he thought to be appropriate. Thus, the imposition of these severe work restrictions may have been Dr. Cracco's way of underscoring the necessity for the recommended surgical procedure more so than it represented an objective and dispassionate evaluation of Claimant's condition. In any event, the work restrictions imposed upon Claimant by Dr. Russo appear to be based on a more objective and impartial evaluation of Claimant's condition. They are accepted and to the extent that Dr. Cracco's work restrictions are in conflict, the latter are rejected.

It is therefore concluded that there has been no change in Claimant's physical condition which would warrant modification. Claimant is however, entitled to receive the recommended fusion. Dr. Russo agreed with Dr. Cracco that Claimant should undergo fusion surgery. (Jan. 1994 Tr. 98). Both physicians cited numerous reasons why surgery was necessary for Claimant. (See Jan. 1994 Tr. 106-107; CX-45, pp. 11, 14-15, 59). Dr. David Aiken's recommendation against surgery is not convincing in light of the many reasons cited by Drs. Cracco and Russo. Therefore, the opinions of Drs. Russo and Cracco are accepted, and Employer will be ordered to provide the recommended surgery in accordance with Section 7 of the Act.

B. Mistake of Fact

The law interpreting Section 22 makes clear that this provision is remedial in nature. The fact finder may consider wholly new evidence, cumulative evidence, or merely may reflect on the evidence initially submitted. O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254 (1971), reh'g denied, 404 U.S. 1053 (1972). "It is clear that an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt." McCord v. Cephas, 532 F.2d 1377, 1380-81 (D.C. Cir. 1976)(quoting Arthur Larson, § 81.52 Workmen's Compensation Law). The basic criteria for reviewing new evidence is "whether reopening would render justice under the Act. Id. (quoting Banks v. Chicago Grain Trimmers Assn., Inc., 390 U.S. 459 (1967) and O'Keefe, supra).

The record shows that mistakes of fact were made in the initial determination of Claimant's average weekly wage as well as in determining the extent of Claimant's disability. Judge Wally determined that since Claimant only worked for forty-two of the fifty-two weeks preceeding his July 31, 1979 injury,[2] Claimant's average earnings calculated under Section 10(c) of the Act, was the average of his earnings for the calendar years 1978 and 1979. Such determination is erroneous as it includes post-injury earnings for five of the twenty-four months. It is clear from the language of Section 10(c) that the focus is on *previous* earnings, not subsequent earnings. Thus, the initial determination of Claimant's average weekly wage must be set aside and a new determination made.

According to Employer/Carrier's own exhibit, Claimant earned $18,996.70 for forty-two weeks in the year preceding his injury. (EX-12). Taking into account that this amount was earned in only 80.8 % of the work year (42 ÷ 52 = 80.8%), it is found that a reasonable representation of Claimant's annual earning capacity

[2] Neither party disputes this date of injury.

is best determined by calculating what Claimant would have earned had he worked the entire fifty-two weeks of the year.[3] Claimant's average annual earning capacity is therefore found to be $23,510.77 ($18,996.70 ÷ 80.8%). This approximates the theoretical optimum earnings sanctioned by the Board in O'Connor v. Jeff Boat Inc., 8 BRBS 290 (1978). Pursuant to Section 10(d)(1) of the Act, Claimant's average annual earnings of $23,510.77 are divided by fifty-two weeks to obtain an average weekly wage of $452.13. It is therefore found that a mistake in fact was made in the calculation of Claimant's average weekly wage in the initial Decision and Order. The finding there that Claimant's average weekly wage is $460.37 is vacated and it is found that Claimant's average weekly wage is $452.13.

The record shows that mistakes of fact were also made in the initial decision in determining the extent of Claimant's temporary disability as well as his permanent disability. Judge Wally, in awarding Claimant temporary total disability from the date of his injury, July 31, 1979, until the date he reached maximum medical improvement on December 18, 1980,[4] failed to take into account that Claimant maintained his employment throughout most of that period, earning as much or more as he did prior to his injury. The record shows that the only times Claimant did not work between these two dates were from August 1, 1979 until September 4, 1979 and from April 28, 1980 to July 9, 1980. Thus, the award for temporary total disability shall be modified to limit the time during which Claimant is entitled to compensation for temporay total disability to those two periods.

The mistakes made in the determination of the extent of Claimant's permanent disability are twofold. The first mistake was the acceptance of Claimant's actual earnings in what was clearly sheltered employment as a basis for determining Claimant's post-injury wage earning capacity under Section 8(h) of the Act. In addition, mistakes were made in the award for permanent partial disability. These mistakes involve a failure to take into account that for certain periods after Claimant reached maximum medical improvement, he earned more than his average weekly wage and was therefore not entitled to compensation for permanent partial disability based on the difference between his average weekly wage and his post-injury wage earning capacity.

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[3] There is evidence that whatever the explanation is for Claimant not working for ten of the fifty-two weeks preceding his injury, it was not because work was unavailable. (Mar. 1991 Tr. 48).

[4] Neither party disputes this date as the date Claimant reached maximum medical improvement.

As previously stated, Claimant continued to work for Employer for over seven years after he reached maximum medical improvement, during which time he earned more than he earned before his injury. That employment ended in March 1988 when Employer went out of business. Thereafter, Claimant was unemployed for six months and then went to work for his brother's insurance agency where he worked for almost two years. Judge Walley based Claimant's wage earning capacity on his earnings at the insurance agency. However, for the reasons described below, it is found that Claimant's post-injury earnings while working for the named Employer as well as while Claimant was working for his brother did not fairly and reasonably represent Claimant's earning capacity.

Section 8(h) of the Act provides that the wage earning capacity of an injured employee who is permanently partially disabled "shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage earning capacity. . . ." Citing Claimant's work and medical history after he resumed what Judge Walley described as Claimant's former employment, Judge Walley concluded that Claimant could not return to his former employment without substantial pain and extraordinary effort. Thus, Judge Walley found that Claimant had established that he was unable to resume his former employment and based Claimant's wage earning capacity on the actual earnings Claimant earned at his brother's insurance agency. Thus, by implication, Judge Walley found that Claimant's job at the insurance agency constituted suitable alternative employment.

This implicit finding is not supported by the record. Claimant's position at U.S.G.A. constituted the only white-collar position that Claimant has had in his entire work history. As Claimant's brother Robert Bunol deposed, Claimant was hired because:

> he was basically a person I could trust to pay attention. He didn't know anything about the functions of the business. But being my brother I trusted him, and he oversaw, and at the same time was instructed to learn as much as he could about claims handling in an insurance company.

(LX-27, p. 10).

According to Robert Bunol, Claimant did not oversee the claims department regardless of his title. Claimant "just paid attention to it for a learning experience, and as a person that I trusted. He had no experience, training, or any other tools to do anything else . . . . If he was capable of picking it up, fine; if he wasn't, that was fine, too. He was my eyes in that department." (LX-27, p. 14). According to Robert Bunol, Claimant did not secure the training or experience necessary to

qualify him to be a claims representative during his tenure at his brother's insurance agency. Id.

Taking into consideration that Claimant never again secured white-collar employment, it is found that Claimant is not qualified as a claims adjuster or as a claims manager and that his employment at his brother's insurance agency from September 1988 to August 1990 constituted sheltered employment which was furnished to him at his brother's beneficence.

Claimant's post-injury work history at George Engine Company is more complex then is suggested by any of the briefs submitted by the parties. First of all, it is clear that after Claimant reached maximum medical improvement and resumed his employment, his job changed. Previously, Claimant worked as a diesel mechanic for Employer on boat engines that required repair. This work entailed travelling to the boat sites as well as working on engines in the shop. Post-injury, Claimant's work was essentially confined to the shop. While this shop work was significantly less rigorous than working on the boats, it nevertheless exceeded the physical restrictions which, intermittently, were placed upon Claimant by Dr. Cracco. These factual conclusions are supported by the testimony of Employer's own shop manager who testified that it was the two diesel mechanics with the bad backs who were confined to working in the shop whereas the other diesel mechanics worked on the boats. (Mar. 1991 Tr. 60).

Dr. Cracco's action in intermittently lifting all work restrictions that he had imposed on Claimant is not construed as conflicting with these factual conclusions. It is clear from Dr. Cracco's testimony that the restrictions were lifted to accomodate Claimant's desire to earn a living. (JX-2, pp. 18-20). It is also clear that Dr. Cracco lifted those restrictions well knowing that to the extent that Claimant exceeded them, it would lead to a deterioration of his back condition. Id. at 18-19.

It is therefore emphatically found that Claimant did not resume his former employment. Instead, he resumed working for Employer in a modified position which shall here be described as moderate duty that ranged somewhere between the light duty restrictions imposed upon Claimant by Dr. Cracco and the heavy duty Claimant performed before his injury. With respect to this moderate duty, it is clear that it entailed activities which were beyond Claimant's physical capabilities and, as Dr. Cracco observed, further lead to a deterioration of Claimant's condition. It is also clear from this record that Claimant performed this modified position in great pain and discomfort. Thus, Judge Walley's findings that Claimant's post-injury work for Employer exceeded Claimant's restrictions and was performed with great pain and discomfort are supported by substantial

evidence and these findings are affirmed.

The record also shows that during an approximate one-year period ending around May, 1985, Claimant's job duties changed to something akin to the duties of a leaderman or a supervisor. (JX-2, p. 13-14). This position was lighter in nature and less rigorous than the modified job Claimant performed both before and after his supervisor's job. The supervisory position seemed to meet the physical restrictions set forth by Dr. Cracco. Id. at 13, 18, 33. According to Dr. Cracco, Claimant reported no pain or discomfort during the year that he was promoted as a supervisor, but afterwards he returned to his "original capacity" and his previous activity levels of lifting, bending, and stooping in excess of the imposed restrictions. Id. at 13, 18. Dr. Cracco expressed the opinion that had Claimant remained within the imposed physical restrictions (by implication, such as when he worked in the supervisory position), Claimant would have remained "relatively symptom free." Id. at 28.

However, Claimant did not remain as a supervisor and it is found that Claimant's actual earnings as a supervisor do not fairly and reasonably represent Claimant's future wage-earning capacity. See 33 U.S.C. § 8(h). Claimant was employed as a supervisor for only one year and then returned to moderate-duty activity as a mechanic for the remaining three years that Employer was in business. As the bulk of Claimant's work experience has been in manual labor as a diesel mechanic, it is found that Claimant's limited supervisory experience did not provide him with the skills necessary to secure a supervisory position elsewhere at a later date. The one-year supervisory position was the first and only time Claimant has ever worked as a supervisor and it is found that he lacks significant supervisory or managerial experience. See Hole v. Miami Shipyards Corp., 640 F.2d 769, 771 (1981). In addition, Claimant's supervisory job was unique in that it utilized the knowledge and expertise he had acquired in his years as a diesel mechanic, but it did not prepare him to be a supervisor in a field totally unrelated to diesel mechanics. Id.

Therefore, it is found that the post-injury wages Claimant earned at Employer's establishment, both as a diesel mechanic and as a supervisor, and the post-injury wages Claimant earned at his brother's insurance company, do not reasonably and fairly represent Claimant's residual wage-earning capacity under Sections 8(c)(21) and 8(h) of the Act. Accordingly, the issue of Claimant's residual wage-earning capacity and the related issue of suitable alternative employment must now be discussed.

When Claimant ceased working for Employer in March, 1988, he remained unemployed until September, 1988 when he secured a job with his brother's insurance agency. Employer has failed to establish that suitable alternative employment was available to

Claimant during his period of unemployment. The earliest job opportunities identified by Employer were on December 27, 1988, when General Rehabilitation Services notified Claimant of several positions. (EX-14 pp. 1, 7). Thus, from March 2, 1988, until August 31, 1988, Claimant is entitled to permanent total disability based on an average weekly wage of $452.13. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). This order increasing compensation shall be applied retroactively to render justice under the Act. See McCord, supra, 532 F.2d at 1381.

Claimant worked for USGA from September, 1988 through August 1, 1990. (Dec. 1992 Tr. 29). During this period, the prior administrative law judge found that Claimant's annual earnings totalled $12,550 per year, which finding is supported by the record. (Decision and Order, p. 12; LX-21 pp. 4-5). To avoid unjust enrichment, Claimant's actual wages for the period he was employed at USGA are accepted as his residual wage-earning capacity for that period only. For the reasons explained above, however, these wages are not accepted as evidence of residual wage-earning capacity upon which to base an award ad infinitum. The prior administrative law judge further determined that Claimant's annual salary of $12,550 corresponded to an average weekly wage of $240.38. (Decision and Order, p. 12). However, a more accurate calculation reveals that an annual salary of $12,550 corresponds to an average weekly wage of $241.35 ($12,550 ÷ 52 = 241.35), a figure slightly higher than the $240.38 figure reached by the prior administrative law judge. It is thus found that Claimant's residual wage-earning capacity for the period that he was employed at USGA is $241.35 per week.

When alternative employment is shown, the wages which the new job would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage-earning capacity. Richardson v. General Dynamics Corp., 23 BRBS 327, 330 (1990). There is no record evidence of what the insurance job at USGA would have paid at the time of Claimant's injury on July 31, 1979. Hence, in applying the percentage difference between the National Average Weekly Wage at the time of suitable alternative employment and at the time of injury, it is found that Claimant's insurance job would have paid $188.25 on July 31, 1979.[5] Claimant has thus suffered a loss of wage-earning capacity and he is entitled to compensation for permanent partial disability based on the difference between his average weekly wage of $452.13 and a residual wage-earning capacity of $188.25 for the period

[5] Claimant's weekly salary of $241.35 at USGA in September, 1988 is approximately 78% of the National Average Weekly Wage (NAWW) of $308.48 in effect at that time. Applying the Richardson formula, seventy-eight percent of $241.35 equals $188.25.

September 1, 1988 through August 1, 1990.

Nevertheless, Employer argues that because of his past experience in the insurance business, Claimant can earn $23,800.00 per year as an insurance agent with State Farm Insurance Company, and that this job constitutes suitable alternative employment. As noted above, Claimant did not acquire skills as a claims examiner during his tenure at USGA. He was employed only through the beneficence of his brother and has worked as a mechanic for most of his life. Even Ms. Favoloro testified that a repair position was probably the most suitable employment opportunity for Claimant based on his experience and training. (Tr. 88-89). For these reasons, it is found that the claims examiner position at State Farm is not within Claimant's background and realm of experience, and it is therefore rejected as suitable alternative employment.

After losing the insurance job at USGA on August 1, 1990, Claimant obtained no further employment and had no wage-earning capacity. Thus, he is permanently and totally disabled until Employer can demonstrate suitable alternative employment. Rinaldi, supra, 25 BRBS at 128. The prior administrative law judge determined that Claimant could physically perform and reasonably compete for the positions of motor vehicle office trainee and shirt presser, which were identified in a labor market survey on December 27, 1988. (EX-14 pp. 7-9). The motor vehicle trainee position paid between $218.00 and $233.00 per week and the shirt presser position paid between $163.00 and $170.00 per week. Id. at 9. Presumably, these jobs identified on December 27, 1988, were also available when Claimant lost his job at USGA in August, 1990.

It is more likely that Claimant would seek the higher-paying position as a motor vehicle trainee, and it is thus found that this position is the best choice out of the two. (See Jan. Tr. 79-80). It is also more likely that Claimant would not begin at the highest wage rate since he has had no similar experience, and it is thereby found that $218.00 represents a more realistic wage-earning capacity. It is further found that as of August 2, 1990, when Claimant lost his insurance job with USGA, suitable alternative employment in the amount of $218.00 per week had been established by Employer on December 27, 1988, and was thus available to Claimant on August 2, 1990. The record contains no evidence of what the motor vehicle trainee position paid on July 31, 1979, the date of Claimant's injury. Thus, in accordance with Richardson, supra, it is found that the position of motor vehicle office trainee would have paid $150.42 per week as of the date of Claimant's injury on July 31, 1979.[6] Claimant has thus

[6] Claimant's residual wage-earning capacity of $218.00 is approximately 69% of the NAWW of $318.12 in effect on the date

suffered a loss of wage-earning capacity, and as of August 2, 1990, he is entitled to a compensation award of permanent partial disability based on the difference between his pre-injury average weekly wage of $452.13 and a post-injury residual wage-earning capacity of $150.42.

However, Employer seeks modification based on a change in fact of Claimant's residual wage-earning capacity and asserts that Claimant can earn a higher wage. Employer offers the testimony and findings of vocational expert Nancy Favoloro to support its argument. In September, 1993, Ms. Favoloro identified several job opportunities that she believed were suitable for Claimant based on his age, education, and experience. (Jan. 1994 Tr. 80). In particular, Ms. Favoloro identified a repair technician position available with Black and Decker that paid between $6.00 and $8.00 per hour. Id. at 76-78. It was Ms. Favoloro's opinion that this position was probably the most suitable for Claimant because it "was repairing things." Id. at 88-89. Ms. Favoloro's opinion is accepted in this regard. Claimant has worked for most of his adult life as a mechanic and repairer of engines, both for Employer and with his own company, Bob's Lawn and Saw. Accordingly, it is found that the repair technician position available at Black and Decker is suitable for Claimant based on his age, education, background, and experience. It is also likely that Claimant would not begin employment at the higher wage rate of $8.00 per hour, and it is thus found that $6.00 per hour, corresponding to a weekly salary of $240.00, represents a more reasonable wage-earning capacity. Since there is no record evidence of what the Black and Decker position paid at the time of injury, it is found that under the Richardson formula, this position would have paid $160.80 on July 31, 1979.[7]

Accordingly, Claimant is entitled to an award of permanent partial disability from August 2, 1990 through August 31, 1993 based on the difference between an average weekly wage of $452.13 and a residual wage-earning capacity of $150.42. Thereafter, from September 1, 1993, and continuing onward, Claimant's compensation award for permanent partial disability is reduced and will be based on the difference between an average weekly wage of $452.13 and a residual wage-earning capacity of $160.80. These compensation-increasing awards shall be applied retroactively in the interests of fairness.

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that suitable alternative employment was demonstrated on December 27, 1988. Sixty-nine percent of $218.00 is $150.42.

[7] Claimant's weekly salary of $240.00 at Black and Decker in September, 1993 is approximately 67% of the NAWW of $360.47 in effect in at that time. Sixty-seven percent of $240.00 is $160.80.

Claimant has made no sincere effort to seek alternative employment on his own. He did not apply for any of the jobs located in the first employment survey nor for any of the positions identified by Ms. Favoloro. Claimant applied for employment twice with Stewart and Stevenson, the company that overtook George Engine Company. (Dec. 1992 Tr. 25-26). He also made phone calls to Delta Diesel and Will's Diesel, both in Harvey, but did not actually submit applications. Id. at 35. Claimant further testified that he attempted to find work in the insurance field after USGA went out of business, but he did not specify what efforts he made. Id. at 34-35. These efforts do not rise to the level of diligence required by New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981). Accordingly, Claimant has not proven that he diligently sought, but was unable to locate, suitable alternative employment.

IV. Conclusion

Based on the foregoing findings of fact and conclusions of law, the following modification order shall be entered.

ORDER

1. In accordance with Section 8(b) of the Act, Employer shall pay Claimant compensation for temporary total disability from August 1, 1979 through September 4, 1979, and from April 28, 1980 to July 9, 1980 based on an average weekly wage of $452.13.

2. In accordance with Section 8(a) of the Act, Employer shall pay Claimant compensation for permanent total disability from March 2, 1988, through August 31, 1988, based on an average weekly wage of $452.13. This order increasing compensation shall be applied retroactively to the date of injury to render justice under the Act.

3. In accordance with Section 8(c) of the Act, Employer shall pay Claimant compensation for permanent partial disability for the following periods and amounts:

a.) from September 1, 1988 through August 1, 1990 compensation shall be paid based on the difference between an average weekly wage of $452.13 and a residual wage-earning capacity of $188.25.

b.) from August 2, 1990, through August 31, 1993 compensation shall be paid based on the difference between an average weekly wage of $452.13 and a residual wage-earning capacity of $150.42;

c.) from September 1, 1993, and continuing onward, compensation shall be paid based on the difference between an average weekly wage of $452.13 and a residual wage-earning capacity of $160.80.

These orders increasing compensation shall be applied retroactively to the date of injury to render justice under the Act.

4. Employer shall continue to pay Claimant's medical expenses in accordance with Section 7 of the Act, and shall authorize and pay for Claimant to have surgery should Claimant so elect.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).

6. Pursuant to Section 14(j) of the Act, Employer is entitled to credit any excess payments already made against any compensation as yet unpaid.

7. Claimant's counsel is granted 30 days from the date of service of this decision in which to file and serve an application for attorney's fees. Thereafter, Employer shall have 20 days following the receipt of such application within which to respond.

_____
QUENTIN P. MCCOLGIN
Administrative Law Judge

Dated _____, 1994
Metairie, Louisiana
QPMC:mef